

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Denial of a Waters
Permit Application 97-6004 of Mark
Miskowiec by the Department of Natural
Resources.

ORDER DENYING
CROSS-MOTIONS FOR
SUMMARY JUDGMENT

Mark Miskowiec (hereinafter "Applicant") applied for a permit from the Department of Natural Resources to place fill and a culvert into a channel that connects Lake George and Wetland 2-362W in Anoka County. The permit was denied, and Applicant appealed the denial. A public hearing was scheduled for January 14, 1997, but that hearing was continued pending the Department Staff's filing of a motion for summary judgment.

On January 7, 1997, the Department Staff filed a motion for summary judgment in this matter. On January 24, 1997, Applicant filed a cross-motion for summary judgment. On February 25, 1997, the last memorandum was filed. Oral argument was scheduled for April 14, but was canceled in order to move along the schedule for a hearing.

Appearing on behalf of the Department Staff is Assistant Attorney General Michelle E. Beeman, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127. Appearing on behalf of Applicant Mark Miskowiec is Thomas H. Gunther, Gunther Law Office, P.A., 700 Lumber Exchange Building, 10 South Fifth Street, Minneapolis, Minnesota 55402.

Based upon all of the files and proceedings herein, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

ORDER

That both the Department Staff's motion for summary judgment and the Applicant's motion for summary judgment be DENIED.

Dated this _____ day of April 1997.

ALLAN W. KLEIN
Administrative Law Judge

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MEMORANDUM

Both the Department and Applicant have filed motions for summary disposition in this matter. Summary disposition is the administrative equivalent of summary judgment. Minn. Rules pt. 1400.5500 (K). Summary judgment is appropriate where (1) there is no genuine issue as to any material fact, and, (2) the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition in contested cases. See Minn. Rules pt. 1400.6600.

It is well established that, in order to successfully resist a motion for summary judgment, the non-moving party must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the non-moving party by substantial evidence; general averments are not enough to meet the non-moving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

The initial dispute before the parties is whether the Department even has jurisdiction over activities in the ditch. Staff argues that the Department has jurisdiction over activities in the ditch for a number of reasons. It argues, first of all, that the ditch is designated as a public water on the map adopted pursuant to the public waters inventory and classification procedure prescribed under laws 1979, Chapter 199. That fact is in dispute. Secondly, it argues the ditch is not a separate entity, but rather is a part of the bed of Lake George. That fact is vigorously disputed by Applicant. Finally, Staff asserts that since Lake George and Wetland 362W are both designated in the inventory, and since the ditch merely connects the two, the entire system must be thought of as one hydrologic unit, all of which must be considered as protected. That assertion is disputed by Applicant as well.

The Applicant, on the other hand, argues that the ditch is a separate entity, is not indicated on either the map or the inventory list, and does not otherwise meet the definition of a "protected water".

As a separate basis for the denial, the Department cites Minn. Rule pt. 6115.0190, subp. 1, which states "it is the goal" of the Department to limit the placement of fill into protected waters in order to maintain consistency with shoreland ordinances.

It is uncontested that the City of Oak Grove opposes the project. In a letter dated July 29, 1996, the City Planner states that the City "strongly recommends denial" of the permit. The City Planner asserts that the property does not have the required legal frontage on a city street necessary for a building permit, does not meet buildability criteria of a five-foot vertical separation to mottled soil per the City Code, and does not meet the 150-foot setback from a natural environment lake, "among other items". However, the record does not contain any conclusive evidence of what the shoreland ordinance prohibits and how Applicant's proposal does not comply with those prohibitions. Nor is it at all clear that the Department's rule, which is couched in terms of a "goal", entitles the Department to deny the permit based on a violation of the ordinance.

After both the Staff and Applicant had submitted their motions for summary judgment and supporting memoranda, the Staff discovered a series of flowage easements which had been granted by landowners to the State in 1943. These easements cover the entire length of the ditch. They grant the State:

. . . a perpetual easement to maintain and regulate the elevation of the waters of George Lake by the construction, operation and maintenance of ditches, dams, and other controlled structures. . . .

The deeds also grant the State:

. . . a perpetual flowage easement covering all those portions of the said lands affected by the maintenance and regulation of the waters of said lake. . . together with the right to trespass with water and to enter upon the lands of said grantors, provided that the grantee shall not so construct, maintain, and operate the said ditches . . . in such manner as to cause flooding of the grantors' lands above contour line 905. . . .

The Staff takes the position that these easements give the State the authority to prohibit any activity that might affect the ditch, or maintenance of the ditch, including placing fill and culverts into the bed of the ditch. The State is not currently prepared to give Applicant permission to build the driveway, and thus the staff reasons that Applicant would be trespassing if he were to proceed. The Staff also argues that Minn. Rule pt. 6115.0240, subp. 2 (1995), as interpreted by the Court of Appeals in In the Matter of the Commissioner's Order Denying Permit Application 93-1024, 527 N.W.2d 173 (Minn. App. 1995), requires an applicant to have sufficient property rights for a proposed project, and that the flowage easement prohibits this application from proceeding further.

Applicant, however, argues that the flowage easement issue is not properly before the Administrative Law Judge for consideration because it was not considered by the Commissioner in his original Order for Denial. Secondly, he argues that the Administrative Law Judge has no authority to "resolve competing real property claims" and should avoid deciding the "fact-laden issue of the validity, scope and effect of flowage easements". But if the easement is to be considered by the Administrative Law

Judge, Applicant argues that the easement is limited to allowing the flooding of land, and nothing more. Applicant suggests that the installation of the crossing (with sufficient culvert capacity) would not impair the State's claimed property right in its easement. The Administrative Law Judge concludes that he does have authority to consider the easement in determining whether or not either party is entitled to prevail as a matter of law. However, the impact of Applicant's proposed project (which does include one or more culverts to allow for the passage of water) on the State's easement interest is a mixed question of fact and law which is in dispute, and which cannot be resolved without additional information.

In summary, there are several critical fact issues in dispute. In addition, there are some legal questions that have not been satisfactorily answered. Taken together, they make it necessary to deny both of the motions for summary disposition. The parties have been informed of this resolution, and are taking steps to either compromise the matter or proceed to hearing.

AWK